Filed 2/24/05 P. v. Powell CA1/1

NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION ONE

THE PEOPLE, Plaintiff and Respondent, v. RICKEY POWELL, Defendant and Appellant.	A104889 (Contra Costa County Super. Ct. No. 05-030764-5)

Defendant was convicted of committing lewd acts upon a person under the age of 14. He and the minor were surprised by police, who were investigating possible trespassing at a vacated apartment. Police detained defendant outside the apartment building while questioning the minor. After determining that the minor was indeed underage and that she and the defendant had had sexual relations, police then asked defendant his age and whether he had a criminal record. When defendant told them that he was an adult and on parole, he was arrested.

Defendant contends that his initial questioning constituted a custodial interrogation and that, in the absence of *Miranda* warnings, these statements and his subsequent post-*Miranda* confession, allegedly the "fruit" of the initial questioning, should have been suppressed. In addition, defendant contends that because evidence was introduced that suggested more than one sexual act between the defendant and the minor, the jury should have been instructed it was required to agree unanimously on a particular criminal act. We affirm.

I. BACKGROUND

Defendant was charged in an amended information, filed June 30, 2003, with two felony counts of a lewd act upon a child under 14 years of age. (Pen. Code, § 288, subd. (a).) The information also alleged that defendant was ineligible for probation because the lewd act involved substantial sexual conduct (Pen. Code, § 1203.066, subd. (a)(8)) and that defendant had committed three prior strike offenses. (Pen. Code, §§ 667, subds. (b)–(i), 1170.12.) A motion to dismiss the second felony count was granted prior to trial.

On February 16, 2003, City of Antioch police were called to investigate suspicious activity at an apartment complex; someone had told the police that persons who were not the tenants had entered an apartment. When police arrived at the apartment, they found an eviction notice on the door. Hearing voices, Officer Mario Manzo knocked on the partially open door, causing it to swing open. Inside, he saw a young man and a girl lying naked on a couch, apparently engaged in sexual intercourse.

Defendant was one of the two on the couch. When he saw Officer Manzo, he jumped up and began to put on his clothes. After asking the girl to dress, Officer Manzo asked the pair if they lived in the apartment. Defendant responded that the apartment belonged to a friend. A second officer then escorted defendant outside while Officer Manzo remained in the apartment to question the minor.

The girl, who appeared underage, admitted to Officer Manzo that she was a minor and that she and defendant had been having intercourse. Although she told the officer she was 17, she was, in fact, 13 years old. After talking with the minor, Officer Manzo went outside to talk with defendant, who was standing in front of the apartment with the other officer. Officer Manzo asked defendant how old he was and whether he had ever been arrested. When defendant answered that he was 21 and was on parole from the California Youth Authority on a charge of robbery, the police placed him under arrest.

While defendant was transported to the local police station, Officer Manzo stayed behind to collect three apparently used condoms lying on the floor. He determined that two of the condoms had fluid in them. Officer Manzo then took the girl home. The

minor was later taken to a hospital, where examining doctors found physical evidence that she had recently engaged in sexual activity.

After he arrived at the police station, defendant was given *Miranda* warnings for the first time and waived them. During a subsequent interview, defendant told Officer Manzo that he had met the minor two weeks before, that he had picked her up at her mother's home that day and taken her to the apartment where they were found, that they had been at the apartment for an hour before the police arrived, and that they had had sexual intercourse once before the officer inadvertently interrupted them, at which time they were preparing to have intercourse again.

The jury convicted defendant on the count of lewd acts with a person under the age of 14, but the court declared a mistrial as to the allegation of substantial sexual conduct after the jury was unable to come to unanimous verdict. In a bifurcated proceeding, the jury found to be true all three prior strike enhancement allegations. At the request of the prosecution, the court dismissed the probation ineligibility allegation, and the court later struck two of the prior strike enhancements. Defendant was sentenced to a mitigated term of three years, doubled to six years as a result of the remaining strike enhancement.

II. DISCUSSION

A. *Defendant's Pre-*Miranda *Statements*

Defendant first contends that the trial court erred in failing to exclude his responses to police questions inside and outside the apartment because they were obtained in violation of *Miranda v. Arizona* (1966) 384 U.S. 436 (*Miranda*) and that his subsequent confession, given after waiving his *Miranda* rights, should have been suppressed as the fruit of this illegal interrogation. In considering this matter, we review any findings of historical fact by the trial court under a substantial evidence standard, but

we decide the ultimate constitutional questions independently. (*People v. Holloway* (2004) 33 Cal.4th 96, 120.)[1]

Miranda holds that a person subject to "custodial interrogation" must be advised of certain rights, among them the right to have an attorney present during the interrogation. (*Rhode Island v. Innis* (1980) 446 U.S. 291, 297.) A "custodial interrogation" is " 'questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way.' " (*Yarborough v. Alvarado* (2004) 541 U.S. 652, ___ [124 S.Ct. 2140, 2147] (*Yarborough*), quoting *Miranda, supra,* 384 U.S. at p. 444; *People v. Ochoa* (1998) 19 Cal.4th 353, 401 (*Ochoa*).) The phrase "custodial interrogation" is crucial; unless the questioning at issue constitutes such an interrogation, *Miranda* does not come into play. (*Ochoa*, at p. 401.) Whether a person is in custody "depends on the objective circumstances of the interrogation." (*Stansbury v. California* (1994) 511 U.S. 318, 323 (*per curiam*).) The question to be answered is: " 'given those circumstances, would a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave.' " (*Yarborough*, at p. 2149, quoting *Thompson v. Keohane* (1995) 516 U.S. 99, 112; *Ochoa,* at pp. 401–402.)

The California Supreme Court has held that "the term 'custody' generally does not include 'a temporary detention for investigation' where an officer detains a person to ask a moderate number of questions to determine his identity and to try to obtain information confirming or dispelling the officer's suspicions." (*People v. Farnam* (2002) 28 Cal.4th 107, 180; *People v. Clair* (1992) 2 Cal.4th 629, 679.) " 'Questioning under these circumstances is designed to bring out the person's explanation or lack of explanation of the circumstances which aroused the suspicion of the police, and thus enable the police to quickly ascertain whether such person should be permitted to go about his business or

[1] There were no disputed findings of historical fact to be reviewed. All of the evidence bearing on this suppression motion came from the testimony of a single police officer whose credibility was neither questioned nor impeached.

held to answer charges.' " (*People v. Aguilera* (1996) 51 Cal.App.4th 1151, 1165, quoting *People v. Milham* (1984) 159 Cal.App.3d 487, 500.) The United States Supreme Court's decision in *Berkemer v. McCarty* (1984) 468 U.S. 420 (*Berkemer*), in which the court held that limited questioning during a roadside traffic stop does not constitute a custodial interrogation, is consistent with this rule. In *Berkemer,* the court noted that although a traffic stop "significantly curtails the 'freedom of action' of the driver" (*id.* at p. 436, quoting *Miranda, supra,* 384 U.S. at p. 444), the stop is presumptively temporary and brief, unlike a typical stationhouse interrogation. (*Berkemer,* at pp. 437–438.) In addition, it is conducted publicly, on a roadway, where the motorist is not "at the mercy of the police." (*Id.* at p. 439.) The court analogized the traffic stop to a typical *Terry* stop (*Terry v. Ohio* (1968) 392 U.S. 1), the brief investigatory detention of persons reasonably suspected of criminal activity that may occur without a warrant, noting that officers can ask such a suspect a "moderate number of questions" to determine his or her identity and to "try to obtain information confirming or dispelling the officer's suspicions." (*Berkemer*, at p. 439.)

To the extent defendant was detained during questioning, there is nothing about the circumstances that suggests custodial restraint. The first question asked by Officer Manzo, immediately after entering the apartment, occurred without any suggestion of an exercise of control over defendant's activities. The officer, presumably as startled to interrupt a sexual act as the participants were to be interrupted, simply asked the two of them whether they belonged in the apartment. Subsequently, defendant walked outside to the front of the apartment, apparently voluntarily, and waited with a second officer for a brief time while Officer Manzo asked a few questions of the minor girl. Defendant was not placed under arrest, there is no indication that defendant's freedom of movement was restrained in any way, and the questioning occurred, as in *Berkemer,* in a public area and in an unthreatening manner. Officer Manzo asked a "moderate number of questions"—two—that were obviously and efficiently designed to confirm or dispel the suspicion that defendant had committed a crime. There is nothing about the objective circumstances of defendant's questioning that would differentiate it from an ordinary investigatory

detention, so as to cause " 'a reasonable person have felt he or she was not at liberty to terminate the interrogation and leave.' " (*Yarborough, supra*, 124 S.Ct. at p. 2149.)[2]

Defendant contends that once the officer's initial question was answered, establishing that the pair did not live in the apartment, the officer had probable cause for an arrest for trespassing or commission of a lewd act upon a minor. As an initial matter, it is by no means clear that either crime had been established at this point, since defendant claimed to be on the premises with the permission of the lessee and the minor's young appearance could have been deceptive. Yet even granting defendant's premise, the circumstances did not require the police to administer *Miranda* warnings prior to further questioning. The existence of a custodial interrogation is not to be determined by the officer's subjective belief or knowledge but by the objective circumstances of the detention. (*Stansbury v. California, supra,* 511 U.S. at p. 323; *People v. Valdivia* (1986) 180 Cal.App.3d 657, 661 [officers with probable cause to arrest not required to provide *Miranda* warnings prior to investigatory questioning].) For the same reason, any belief defendant might have had that the police intended to arrest him did not convert what was objectively an investigatory detention into a custodial interrogation.

Defendant also argues that his questioning should be evaluated against a variety of factors developed in Ninth Circuit decisions to determine whether a custodial interrogation has occurred. Because we find this questioning to be plainly lawful under existing California authority, it is unnecessary to consider the federal case law. (See, e.g., *Levy v. Skywalker Sound* (2003) 108 Cal.App.4th 753, 762, fn. 8 ["decisions of the lower federal courts on questions of federal law are persuasive, and entitled to great weight, but are not binding precedent"].)

Defendant further contends that because he was on parole at the time of the questioning, he was in "constructive custody" and therefore entitled to *Miranda* warnings

---

[2] Defendant also argues that the questioning constituted an interrogation. Because we find that defendant was not in custody at the time of the questioning, it does not matter whether the questions constituted an interrogation for purposes of *Miranda.* (*Ochoa, supra*, 19 Cal.4th at p. 401.)

before any questioning could occur, citing *People v. Farris* (1981) 120 Cal.App.3d 51, 56. *Farris,* however, announced no such broad rule. Rather, it rested its decision on the fact that the defendant's questioning occurred during a warrantless search conducted by his parole officer and another officer pursuant to the defendant's conditions of parole. As the court noted, because the defendant was aware that he could be detained at any time as a result of his parole status, he had reason to believe that he was not "free to leave" while the search was underway. (*Ibid.*) The fundamental determinant of a custodial interrogation—that a reasonable person would have felt he or she was not at liberty to terminate the interrogation and leave (*Yarborough, supra*, 124 S.Ct. at p. 2149)—was therefore present. In contrast, because these officers were unaware that defendant was a parolee, they did not assert that their questioning was occurring under the authority granted by his parole conditions. Unlike the defendant in *Farris,* defendant had no reason to think that, at the time of the questioning, his parole status restricted his liberty to terminate the interrogation and leave.

Because we conclude that defendant's initial questioning was constitutional, we need not consider the contention that his subsequent, post-*Miranda* statements should be suppressed as the fruit of a statement obtained unconstitutionally.

B. *The Failure to Give a Unanimity Instruction*

Defendant contends that the possibility of more than one criminal act was demonstrated by the evidence that (1) he confessed to one act of sexual intercourse with the minor and claimed to be preparing to have intercourse a second time when the officers arrived, (2) Officer Manzo testified that defendant and the minor appeared to be having intercourse when he walked in, and (3) either one or two of the condoms found on the floor contained fluid. As a result, he argues, the trial court erred in failing to give a "unanimity instruction" requiring the jurors to agree unanimously that defendant

committed a particular criminal act. (*People v. Diedrich* (1982) 31 Cal.3d 263, 280–282 (*Diedrich*).)[3]

The law governing the unanimity instruction was summarized in *People v. Melhado* (1998) 60 Cal.App.4th 1529, 1534: "When an accusatory pleading charges the defendant with a single criminal act, and the evidence presented at trial tends to show more than one such unlawful act, either the prosecution must elect the specific act relied upon to prove the charge to the jury, or the court must instruct the jury that it must unanimously agree that the defendant committed the same specific criminal act. [Citation.] The duty to instruct on unanimity when no election has been made rests upon the court sua sponte. [Citation.] Because jury unanimity is a constitutionally based concept, '. . . the defendant is entitled to a verdict in which all 12 jurors concur, beyond a reasonable doubt, as to each count charged.' [Citation.] . . . [¶] . . . By giving the unanimity instruction the trial court can ensure that a defendant will not be convicted when there is no agreement among the jurors as to which single offense was committed. [Citation.]"

This general rule governing the unanimity instruction is subject to a significant exception. Sometimes called the " 'continuous conduct exception' " (*Diedrich, supra,* 31 Cal.3d at p. 281), the exception holds, in relevant part,[4] that a unanimity instruction is

---

[3] The unanimity instruction is currently embodied in CALJIC No. 17.01 (Jan. 2005 ed.), which provides: "The defendant is accused of having committed the crime of _____ [in Count ___]. The prosecution has introduced evidence for the purpose of showing that there is more than one [act] [or] [omission] upon which a conviction [on Count ___] may be based. Defendant may be found guilty if the proof shows beyond a reasonable doubt that [he] [she] committed any one or more of the [acts] [or] [omissions]. However, in order to return a verdict of guilty [to Count ___], all jurors must agree that [he] [she] committed the same [act] [or] [omission] [or] [acts] [or] [omissions]. It is not necessary that the particular [act] [or] [omission] agreed upon be stated in your verdict."

[4] A second aspect of the exception holds that a unanimity instruction is unnecessary when the defendant is charged with the type of offense that consists of a continuous course of conduct. (*Diedrich, supra*, 31 Cal.3d at p. 282.) Given our holding,

unnecessary when " 'the acts are so closely connected that they form part of one and the same transaction, and thus one offense.' " (*People v. Napoles* (2002) 104 Cal.App.4th 108, 115; *People v. Stankewitz* (1990) 51 Cal.3d 72, 100.) The exception commonly has been applied in prosecutions featuring a sexual assault involving more than one criminal act. If the assault was essentially continuous, occurring over a relatively short period of time and uninterrupted by other events, a unanimity instruction has been held unnecessary even though the evidence suggests that the defendant committed a particular criminal sexual act more than once during the course of the assault. (E.g., *People v. Mota* (1981) 115 Cal.App.3d 227, 233 [virtually continuous rape committed by three separate men over an hour]; *People v. McIntyre* (1981) 115 Cal.App.3d 899, 910 [unanimity instruction unnecessary where evidence showed two events of forcible oral copulation, one immediately before and one immediately after a rape]; *People v. Gonzalez* (1983) 141 Cal.App.3d 786, 791–792, disapproved on other grounds in *People v. Kurtzman* (1988) 46 Cal.3d 322, 330 [unanimity instruction unnecessary where evidence showed two incidents of vaginal penetration, one immediately before and one immediately after an act of sodomy]; compare *People v. Gordon* (1985) 165 Cal.App.3d 839, 854, disapproved on other grounds in *People v. Frazer* (1999) 21 Cal.4th 737, 765 [error not to give unanimity instruction where evidence showed two acts of sodomy over a period of 23 months]; *People v. Brown* (1996) 42 Cal.App.4th 1493, 1501 [error not to give unanimity instruction where evidence showed three separate incidents over two days].) Many of the cases are cited and summarized in *People v. Mota,* at p. 233, which concludes, "The many continuous acts of forced sexual intercourse which were committed by each assailant were part of the same event since they were all committed within an hour's time in the back of the van. . . . [¶] . . . Numerous cases hold that the prosecution need not inform 'the defense as to which specific offense it [intends] to rely upon for a conviction [where] the indictment [charges] but one offense and the evidence

---

we need not address the government's contention that this aspect of the exception is also applicable here.

[tends] to prove two or more separate and distinct acts, either one of which would have supported the charge of rape, where the acts complained of were perpetrated on the same occasion and within a few minutes of each other, and constituted one continuous felonious act.' [Citations]."

While defendant's intercourse with the minor was not charged as a sexual assault, the nature of his encounter with the minor makes the general principle equally applicable. The defendant and the minor were involved in some type of sexual activity for an uninterrupted hour. Regardless of how many times defendant had sexual intercourse with the minor during that time, his interaction with her constituted a single criminal sexual encounter. So long as the members of the jury agreed that the defendant had sexual intercourse with the minor during their hour in the apartment, it was unnecessary for them to agree on any particular act of intercourse. Under these circumstances, the trial court did not err in failing to give a unanimity instruction.

III. DISPOSITION

Defendant's conviction is affirmed.

_____
Margulies, J.

We concur:

_____
Marchiano, P.J.

_____
Swager, J.